CORD
AND
RIEFS

No. 16-1436

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In The
Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,

Petitioners,

v.

INTERNATIONAL REFUGEE
ASSOCIATION PROJECT, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICUS CURIAE* OF SUSAN ABELES IN SUPPORT OF NEITHER PARTY

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Interest of the *Amicus* [1]

A dispositive legal issue in this case parallels a legal issue that the Court of Appeals for the Fourth Circuit decided recently against *amicus* Susan Abeles. Ms. Abeles will shortly be filing with this Court a Petition for a Writ of Certiorari to review that erroneous decision. The *amicus* is submitting this brief not to support either side in this particular litigation, but to alert this Court (a) to the conflicting rulings of the Fourth Circuit and (b) to the inconsistency between the Fourth Circuit's attitude to claims of religious discrimination by Muslims and a comparable claim of religious bias with more compelling facts made by an Orthodox Jew.

Susan Abeles is the plaintiff-appellant in *Abeles v. Metropolitan Washington Airports Authority*, a 16-page decision of the United States Court of Appeals for the Fourth Circuit that can be found at 2017 WL 374741 (4th Cir. Jan. 26, 2017). The Fourth Circuit's "Unpublished" decision appears as Appendix I to this Brief *Amicus Curiae*.

On February 9, 2017, Ms. Abeles filed a Petition for Rehearing and Rehearing En Banc with the Fourth Circuit, noting, *inter alia*, a patent factual error in the panel's opinion. A copy of the Petition for

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part. No person or party other than the *amicus* has made a monetary contribution to this brief's preparation or submission. All parties have consented in writing to the filing of this *amicus* brief.

Rehearing and Rehearing En Banc appears as Appendix II to this Brief *Amicus Curiae.*

On February 23, 2017, the Court of Appeals for the Fourth Circuit denied Ms. Abeles' Petition for Rehearing En Banc. The Chief Justice thereafter extended the time within which to file a Petition for a Writ of Certiorari to July 23, 2017.

Undersigned counsel represents that Ms. Abeles intends to file a Petition for a Writ of Certiorari with this Court on or before July 23, 2017.

Ten Judges of the Court of Appeals for the Fourth Circuit have determined in this case that the President's "temporary suspension of entry" to the United States constitutes impermissible anti-Muslim religious bias in violation of the Establishment Clause of the First Amendment because candidate Trump's expressed motivation "drips with religious intolerance, animus, and discrimination." Pet. App. 168a.

This factual finding – described by the Fourth Circuit Judges as based on "evidence [that] . . . stares us in the face" (Pet. App. 60a) – cannot be reconciled with the tacit approval by the same Fourth Circuit Judges of much more flagrant religious anti-Jewish prejudice suffered by Susan Abeles. She was punished by the Metropolitan Washington Airports Authority – a quasi-governmental agency – for having been absent from work on the last two days of Passover 2013 after she had received e-mailed approval from her supervisor to take annual leave on those days.

Such conduct by an employer is anti-Jewish religious prejudice that violates the Civil Rights Act. The undisputed evidence in Susan's case "stared" the Judges of the Fourth Circuit in their faces. When they ignored this evidence, the Fourth Circuit Judges proved the aphorism by Jonathan Swift that the majority opinion quoted – "There's none so blind as they that won't see."

A strong correlation exists between Susan Abeles' case and the second Question Presented in the Solicitor General's Petition for Certiorari. The evidence on which 10 judges of the Fourth Circuit relied to find anti-Muslim bias in the issuance of a Presidential Executive Order was less convincing and more equivocal than the proof of anti-Jewish religious bias in *Abeles v. Metropolitan Washington Airports Authority*. Yet the Fourth Circuit summarily rejected Susan Abeles' claim while sustaining the allegation of religious prejudice in the present case.

Statement of Facts

Susan Abeles (hereinafter "Susan") is an Orthodox Jew who was employed by the Metropolitan Washington Airports Authority ("MWAA"), The MWAA's Board of Directors is appointed by the Governors of Maryland and Virginia, the Mayor of the District of Columbia, and the President of the United States. The MWAA administers Ronald Reagan Washington National Airport and Washington Dulles International Airport.

In 2013 Susan was suspended without pay for having taken annual leave to observe the last two

days of Passover. During the 26 previous years that she worked at the same job for MWAA, she had given her supervisors a list of Jewish holidays at the beginning of every calendar year. They knew that on Jewish holidays like Rosh Hashanah, Yom Kippur, Sukkot, and Passover she would be out on annual leave.

Susan had relatively new supervisors in 2013, and they did not like her. She disputed their allegation that she was "insubordinate." Her past performance evaluations by many different supervisors had been excellent, and she had won several awards. When the Passover holiday approached, Susan noted the four dates when religious observance would keep her out of the office on her supervisors' Outlook calendars as they requested.

The concluding two days of Passover in 2013 were on Monday and Tuesday. Neither of her supervisors was in the office on the Friday before the holiday, so Susan sent them an e-mail reminder at noon that she would be out of the office to observe the religious holiday on Monday and Tuesday. Her second-level supervisor replied in an e-mail: "Thanks. Please see my note about providing us a status update before you leave today."

This was full compliance with the language of the MWAA's "Absence and Leave Directive" which specified that employees should have "an exchange of e-mails between the employee and supervisor" in order to take annual leave. Nonetheless, when Susan returned to work the following week she was told she had been "AWOL" for the last two days of Passover

because her immediate supervisor had not given her oral approval. Susan was suspended without pay for an additional 5 days for "failure to follow leave procedures" and "being absent without leave." The AWOL punishment and suspension without pay were approved by MWAA's Vice-President for Finance and Chief Financial Officer. In such a hostile work environment that failed to respect her religion, Susan felt she had no choice other than to take early retirement.

Section 701(j) of the federal Civil Rights Act, 42 U.S.C. § 2000e(j), defines "religion" as requiring government and private employers to make a "reasonable accommodation" for the religious observances of their employees. Susan filed a complaint with the Equal Employment Opportunity Commission, and then brought a federal lawsuit against the MWAA. The MWAA moved the case from the District of Columbia to Virginia, and 16 days before a jury trial was to begin, the federal judge in Virginia threw out Susan's case on summary judgment. In an opinion he issued more than two weeks after his decision (*Abeles v. Metropolitan Washington Airports Authority*, 2016 WL 6892103 (E.D. Va. April 1, 2016), the district judge did not even mention the "reasonable accommodation" provision of federal law.

Although her appeal was supported by both the American Jewish Committee and the Becket Fund for Religious Liberty, three judges of the Fourth Circuit rejected Susan's appeal on the ground that Susan did "not establish... a religious conflict with an employment requirement." Contradicting undisputed documentary evidence, the three

appellate judges declared that Susan had "failed to obtain advance approval for her absence on April 1 and 2, which coincided with the last two days of Passover in 2013."

Susan's Petition for Rehearing En Banc called to the attention of the full complement of active Fourth Circuit judges the language of the MWAA's directive on annual leave, which did not require approval by an employee's "immediate" supervisor. It also noted the exchange of e-mails between Susan and her second-level supervisor that had been set forth in detail in the appellate briefs. See pp. 20a-21a, *infra*. The full court – including all 10 judges who later concluded that anti-Muslim bias invalidated Section 2(c) of Executive Order No. 13,780 — were oblivious to flagrant anti-Jewish religious discrimination and rejected Susan's request for rehearing.

Argument

Susan Abeles is an American citizen who has no legal standing to support or oppose enforcement of Section 2(c) of Executive Order No. 13,780. As a religiously observant Orthodox Jew, however, she is entitled to the same legal protection against anti-Jewish religious bias under Title VII of the Civil Rights Act as Muslim Americans are granted against anti-Muslim bias by government agencies under the Establishment Clause of the First Amendment.

Apparently moved by "political correctness" in today's climate, ten Judges of the Fourth Circuit brushed aside the flagrant anti-Jewish bias shown in Susan's case while finding, on more equivocal and debatable evidence, that an Executive Order issued

by the President to protect the security of the American homeland "drips with religious intolerance, animus, and discrimination."

This *amicus* brief takes neither side in the politically charged battle over the breadth of the President's authority. It is filed to draw the Court's attention to the probability, demonstrated vividly by the Fourth Circuit's inconsistent rulings, that, in the current concern over protecting the rights of American Muslims, religious minorities other than Muslims may now be slighted and ignored.

For at least the two reasons summarized below the Fourth Circuit should have been more receptive to the claim made by Susan Abeles in her allegation of religious discrimination in employment than it was to the charge of anti-religious animus that it approved in this case.

A. The *Kleindienst v. Mandel* Standard Does Not Govern Lawsuits Challenging Religious Discrimination in Employment.

The Fourth Circuit could not invalidate the President's Executive Order without countering the restriction articulated in *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), that secures "facially legitimate and bona fide" exercises of executive discretion in the immigration context against constitutional challenge. The Judges of the Fourth Circuit pierced that legal shield in determining that Section 2(c) of Executive Order No. 13,780 was anti-Muslim religious discrimination. Susan's claim of anti-Jewish religious bias in employment had no comparable obstacle. A "facially legitimate" pretext and an assertion of good faith could not validate the

AWOL punishment imposed by the MWAA. Nonetheless, the Fourth Circuit sustained the claim of anti-Muslim bias in the immigration context while rejecting Susan's claim that she was victimized by anti-Jewish punishment in her employment.

B. Absent "Undue Hardship," Religious Discrimination in Employment Is Unlawful.

In the present case, President Trump and the Solicitor General offer multiple reasons why, absent religious prejudice, the Executive Order is a necessary and proper means of protecting national security. This record contains substantial national-policy justifications for the measure that the Fourth Circuit found religiously discriminatory.

In Susan's case, by contrast, no claim has ever been made by MWAA that the punishment imposed for Susan's absence on the last two days of Passover is justified by harm attributable to her absence. The MWAA has not invoked "undue hardship," which is the ***only*** available defense for denying an employee's religious observance under Section 701(j) of the Civil Rights Act. The Fourth Circuit was demonstrably inconsistent and unjustifiably hostile to the claim of an Orthodox Jew when it accepted the religious discrimination claim of the respondents in this case

while rejecting Susan Abeles' claim that she was the victim of anti-Jewish religious bias in her employment with the Metropolitan Washington Airports Authority.

Respectfully submitted,

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APPENDIX I

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-1330

SUSAN H. ABELES,
Plaintiff – Appellant,
v.
METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, Defendant – Appellee,
and JULIA HODGE; VALERIE O'HARA,
Defendants.

THE AMERICAN JEWISH COMMITTEE; THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS; THE BECKET FUND FOR RELIGIOUS LIBERTY, Amici Supporting Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, Senior District Judge. (1:15-cv-00792-CMH-IDD)

Argued:December 8, 2016 Decided: January 26, 2017
Before WILKINSON, SHEDD, and DUNCAN, Circuit Judges. Affirmed by unpublished opinion. Judge Duncan wrote the opinion, in which Judge Wilkinson and Judge Shedd joined.

ARGUED: Nathan Lewin, LEWIN & LEWIN, LLP, Washington, D.C., for Appellant. Bruce P. Heppen, WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Washington, D.C., for Appellee. ON BRIEF: Joseph W. Santini, Morris Kletzkin, FRIEDLANDER MISLER, PLLC, Washington, D.C., for Appellee. Dennis Rapps, New York, New York; Meir Katz, MAGEN LEGAL, Baltimore, Maryland, for Amicus The National Jewish Commission on Law and Public Affairs "COLPA". Eric C. Rassbach, THE BECKET FUND FOR RELIGIOUS LIBERTY, Washington, D.C., for Amici The American Jewish Committee and The Becket Fund for Religious Liberty.

Unpublished opinions are not binding precedent in this circuit.

DUNCAN, Circuit Judge: Plaintiff-Appellant Susan H. Abeles sued her employer Metropolitan Washington Airports Authority ("MWAA" or "Defendant") and her supervisors, alleging religious discrimination in violation of Title VII, deprivation of civil rights under 42 U.S.C. § 1983, and violations of federal and state religious freedom acts. The district court granted the individual supervisors' motions to dismiss but denied MWAA's motion to dismiss. After discovery, the district court granted summary judgment to MWAA on all claims. Plaintiff appeals each of these rulings. For the reasons that follow, we affirm.

I. A. Plaintiff, a practicing Orthodox Jew, began working at MWAA in 1987.[1] MWAA knew Plaintiff's religious beliefs prohibited her from working on Jewish holidays. During 2012 and 2013--the relevant time period for this case--Plaintiff reported to Valerie O'Hara ("O'Hara"), who in turn reported to Julia Hodge ("Hodge"). In her 26 years of working at MWAA, Plaintiff's supervisors always allowed Plaintiff to leave early on Fridays so that she could arrive home before sundown to observe the Sabbath in the winter months. On occasion, MWAA also provided kosher food at staff events in recognition of Plaintiff's religious dietary requirements. MWAA--including Plaintiff's first-level supervisor, O'Hara--never denied Plaintiff leave to observe a religious holiday when she requested leave prior to being out of the office. The instant dispute arises from Plaintiff's failure to follow MWAA's formal procedure for requesting leave. MWAA's Absence and Leave Program ("Leave Policy") specifies that employees must request leave by form or email and receive approval before taking leave. Plaintiff was aware of the Leave Policy and had seen the document before.

In addition to MWAA's formal process, the department in which Plaintiff worked used an informal planning calendar to help determine coverage based on when people would be in the

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[1] MWAA is a "regional entity" that the Virginia General Assembly and the District of Columbia City Council, acting pursuant to an interstate compact, jointly created for the purpose of operating the federally owned Washington-Dulles International Airport and Ronald Reagan Washington National Airport. *Washington-Dulles Transp., Ltd. v. Metro. Wash. Airports Auth.*, 263 F.3d 371, 373 (4th Cir. 2001)

office. In January 2013, Plaintiff noted on this internal planning calendar the dates she anticipated she would be out on leave that year. After marking the internal planning calendar, Plaintiff did not discuss the specific dates with her supervisors. O'Hara and Hodge never told Plaintiff that putting dates on the internal planning calendar relieved her of her responsibility to request leave properly and receive advance approval.[2]

In February 2013, Plaintiff had multiple meetings with O'Hara and Hodge, as well as MWAA's Labor Relations Specialist Juan Ramos, regarding her "2013 Work Goals and Performance Factors." That plan highlighted the need for her to submit her reports on time and that she must "[u]se leave according to the Airports Authority's Absence and Leave Policy." J.A. 347.

In 2013, the eight-day Jewish holiday of Passover occurred between Tuesday, March 26 and Tuesday, April 2. Plaintiff's religious beliefs preclude labor on the first two days and last two days of Passover. On Thursday, March 21, 2013, at a weekly meeting, Plaintiff requested leave from O'Hara to observe the first two days of Passover on March 26 and 27, 2013. Plaintiff discussed her leave with O'Hara, received advance approval, and then sent O'Hara an Outlook calendar invitation. On March 21, Plaintiff knew

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[2] Plaintiff alleges that the MWAA left leave policy to the discretion of individual supervisors. However, MWAA maintains that the internal planning calendar did not substitute for formal procedure as stipulated by the Leave Policy.

that she would also need to take leave on Monday, April 1 and Tuesday, April 2, but did not request leave for those days.

After observing the first two days of Passover, Plaintiff returned to work on Thursday, March 28, 2013. O'Hara was also in the office on March 28, but Plaintiff did not request leave that day for April 1 and 2, 2013, the last two days of Passover.

On Friday, March 29, 2013, Plaintiff sent an Outlook calendar invitation to O'Hara and Hodge, "notifying" them that she would be out of the office on April 1 and 2, 2013. Plaintiff did not intend this Outlook calendar invitation to be a request for leave, but merely a "reminder" of the dates she had placed on the internal calendar. J.A. 283, 289. Plaintiff planned to discuss her leave request with O'Hara in person on March 29, 2013, but O'Hara was out of the office that day. O'Hara did not respond to Plaintiff's March 29, 2013, Outlook calendar invitation.[3]

On April 3, 2013, when O'Hara returned to the office, she sent an email to Plaintiff that stated her absence on April 1 and 2 "was not pre-approved" by O'Hara or Hodge and that "[a]s a matter of process"

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[3] Although Hodge, Plaintiff's second-level supervisor, responded to Plaintiff's March 29, 2013, Outlook calendar invitation, Hodge stated in her deposition that she assumed Plaintiff had already sought and received approval consistent with the Leave Policy from O'Hara, in part because Plaintiff explained in a reply email that the calendar invitation was a "reminder of [her] scheduled leave." J.A. 326.

the internal planning calendar "is for the Manager's resource planning" and "not for pre-approving leave." J.A. 10; *see also* J.A. 114. O'Hara continued: "Sending a meeting request on a day that I'm on leave to request leave for the following two days is unacceptable." J.A. 10; *see also* J.A. 114. In the email, O'Hara also granted Plaintiff's telephone request for leave on April 3, 2013--leave Plaintiff requested due to the death of an uncle. O'Hara subsequently classified Plaintiff's absence on April 1 and 2 as "Absent Without Leave" or "AWOL."

On April 12, 2013, Plaintiff received a letter from Hodge proposing a five-day suspension as discipline for (1) insubordination, for failing to meet deadlines regarding deliverables including a plan to automate her work and completion of her annual performance goals; (2) failure to follow the procedure for requesting leave; and (3) absence without leave on April 1 and 2. In her deposition testimony, Plaintiff did not refute any of the facts in the letter, other than to clarify that she failed to meet one deadline because of the death of an aunt.

Regarding insubordination, the Table of Penalties in MWAA's Conduct and Discipline Directive states that the penalty for a first offense of "failure to carry out orders" is "oral reprimand to 5 days suspension," and the penalty for a first offense of "refusal to carry out orders" is "5 days suspension to removal." J.A. 131, 220. Plaintiff's suspension became final on May 3, 2013.

Later, Plaintiff requested leave to observe another Jewish holiday in May 2013, which O'Hara granted. Plaintiff retired from MWAA on May 31, 2013.

On September 17, 2013, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging religious discrimination in violation of Title VII. On February 7, 2015, Plaintiff received a "Dismissal and Notice of Rights" letter from the EEOC, which provides a potential plaintiff the right to sue.

B. On May 5, 2015, Plaintiff filed suit in the United States District Court for the District of Columbia against MWAA, and supervisors O'Hara and Hodge, alleging violations of Title VII, 42 U.S.C. § 2000e-2(a)(1) (employment discrimination on the basis of religion), 42 U.S.C. § 1983 (deprivation of civil rights), the federal Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb et seq., and the Virginia Religious Freedom Act ("VRFA"), Va. Code Ann. Section 57-2.02. The district court transferred the case to the United States District Court for the Eastern District of Virginia.

On August 17, 2015, the district court granted Hodge and O'Hara's motions to dismiss, but denied MWAA's motion to dismiss. The district court later granted summary judgment to MWAA on all claims, finding that the record does not reflect direct or circumstantial evidence of religious discrimination, the § 1983 claim is time barred, and the federal and

state religious freedom acts do not apply.[4] Plaintiff appeals each of these rulings.

II. We review de novo a district court's decisions to grant a motion to dismiss and a motion for summary judgment. *White v. BFI Waste Services, LLC*,375 F.3d 288,291,294 (4th Cir. 2004). In reviewing the district court's grant of summary judgment, we view the facts and draw all reasonable inferences in the light most favorable to the nonmoving party. *Id.* at 294. However, the nonmoving party must set forth specific facts that go beyond the "mere existence of a scintilla of evidence." *Anderson v. Liberty Lobby, Inc.*, 477 U.S.242, 252 (1986). The nonmoving party bears the burden of demonstrating a genuine issue of material fact for trial; conclusory or speculative allegations do not suffice. *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir. 2002).

III. A. Title VII of the Civil Rights Act of 1964 provides two ways of proving discrimination in employment by showing: (1) "disparate treatment" or (2) "disparate impact." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015); 42 U.S.C. § 2000e-2(a). Plaintiff alleges "disparate

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[4]Because we conclude that MWAA did not discriminate against Plaintiff on the basis of her religion in violation of Title VII, and the record indicates MWAA always allowed Plaintiff to observe the Sabbath and religious holidays if she complied with formal procedure, MWAA necessarily did not "substantially burden" Plaintiff's "exercise of religion" in violation of the federal and state religious freedom acts. 42U.S.C.§2000bb-1(u); Va. Code Ann. §57-2.02(B). Therefore, we decline to reach the issue whether those statutes--which apply only to "government" and a "government entity"--apply to MWAA.

treatment"--that is, "intentional discrimination"--under 42 U.S.C. § 2000e-2(a)(1) on the basis of her religion. That provision prohibits an employer from (1) "discriminat[ing] against any individual" (2) "because of" (3) "such individual's . . . religion." *Id.* § 2000e-2(a)(1). Title VII, in turn, defines religion to "includ[e] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to *reasonably accommodate* to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j) (emphasis added). "Because this definition includes a requirement that an employer 'accommodate' an employee's religious expression," an employee alleging intentional discrimination under § 2000e-2(a)(1) can bring suit based on a disparate-treatment theory or a failure-to-accommodate theory. *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1018 (4th Cir. 1996) (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977)).

Plaintiff argues that the district court erred by granting summary judgment to Defendants on her Title VII claim because it (1) impermissibly resolved factual issues when evaluating her claim under a disparate-treatment theory and (2) failed to consider her claim under a failure-to-accommodate theory. Plaintiff also argues (3) that the district court erred in granting her supervisors' motions to dismiss. We consider each argument in turn.

1. "To prove a claim under the disparate treatment theory, an employee must demonstrate that the

employer treated her differently than other employees because of her religious beliefs." *Chalmers*, 101 F.3d at 1017 (emphasis omitted). Absent direct evidence of discrimination,[5] a plaintiff can establish discrimination via circumstantial evidence under the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The burden-shifting framework first requires the plaintiff to establish a prima facie case of discrimination before the burden shifts to the employer to provide evidence of a legitimate, nondiscriminatory reason for its employment action; if the employer does so, the burden shifts back to the employee to show that the employer's proffered reason is pretextual. *Chalmers*, 101 F.3d at 1018. To establish a prima facie case, a plaintiff must show "(1) membership in a protected class, (2) satisfactory job performance, (3) adverse employment action, and (4) different treatment"--which here means more severe discipline--"than similarly situated employees outside the protected class." *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010); *Cook v. CSX Transp. Co.*, 988 F.2d 507, 511 (4th Cir. 1993).

Applying this framework, the district court concluded that Plaintiff had not established a prima facie case of discrimination under a disparate-treatment theory. As an individual alleging discrimination on the basis of her faith, Plaintiff is a member of a protected class. And she suffered an

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[5]Plaintiff does not contest the district court's conclusion that Plaintiff adduced no direct evidence of discrimination.

adverse employment action because MWAA suspended her, in part, because of the allegedly discriminatory AWOL finding. However, the district court concluded that "Plaintiff fails to establish a prima facie case of discrimination under Title VII because she cannot demonstrate satisfactory job performance or that she was treated differently from similarly situated employees outside the protected class." J.A. 514. We agree.

First, as to her job performance, Plaintiff argues that the district court incorrectly determined that she did not dispute the charge of insubordination and that it alone merited a five-day suspension, regardless of the allegedly discriminatory AWOL classification. The record belies Plaintiff's argument. As MWAA notes, the Table of Penalties contained in MWAA's Conduct and Discipline Directive states that the penalty for a first offense of "failure to carry out orders" is "oral reprimand to 5 days suspension," and the penalty for a first offense of "refusal to carry out orders" is "5 days suspension to removal." J.A. 131, 220. Plaintiff points to a portion of Hodge's deposition to suggest that, absent Plaintiff's failure to request leave properly, MWAA would only have "reprimanded" Plaintiff for insubordination. But Hodge did not so concede.[6]

Plaintiff also asserts that she disputed the allegations regarding insubordination in her deposition. But the portion she cites reveals that she

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[6] Hodge stated: "*At a minimum,* [Plaintiff] would have been reprimanded." J.A. 334 (emphasis added).

did not refute any of the charges. J.A.292-94. MWAA attorneys asked Plaintiff several times whether the contents of the April 12 disciplinary letter, including the charge of insubordination--paragraph by paragraph--were inaccurate. She disputed nothing, and only explained the tardiness of one report by citing the death of an aunt. Plaintiff also asserts that she "disputed" part of MWAA's Statement of Undisputed Material Facts, which cited deposition testimony explaining that Plaintiff's "supervisors had concerns regarding her deteriorating performance and attendance and began to supervise her more closely in an effort to improve both. Numerous meetings were held throughout the first three months of 2013 in an effort to improve [Plaintiff's] performance and attendance." J.A.127 ¶17. Without any citation to the record, Plaintiff simply stated "False" in her Response to Defendant's Statement of Undisputed Material Facts. J.A.427.[7]Conclusory allegations do not suffice to create a genuine issue of material fact for trial. *SeeThompson*, 312 F.3dat 649.

Even if Plaintiff could establish a genuine issue of material fact regarding whether her work performance was satisfactory, Plaintiff adduces no evidence that MWAA treated her differently from

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[7]Plaintiff also argues that she disputed the charge of insubordination in a letter written by her attorney to MWAA. However, that letters not included in the record on appeal. An "appellate court normally will not consider facts outside the record on appeal," and we decline to do so with regard to this letter. *Colonial Penn Ins. Co. v. Coil*, 887 F.2d1236, 1239 (4th Cir. 1989).

similarly-situated employees outside her protected class. In Plaintiff's Statement of Undisputed Material Facts, she states--again, with no citation to the recordor other evidence--that: "No employee of MWAA has ever been suspended for as much as three (3) days for being AWOL or for taking annual leave without approval of a request of annual leave." J.A. 435. Plaintiff provides no evidence that she received more severe discipline than similarly-situated employees outside her protected class, nor any comparators on the basis of which to make this assessment. *See Cook*, 988 F.2d at 511.

Plaintiff does not establish a genuine dispute of material fact either that she performed her work satisfactorily or that MWAA disciplined her more severely than other similarly-situated employees outside her protected class. Plaintiff thus fails to establish a prima facie case of discrimination under a disparate-treatment theory.

2. Plaintiff's "primary argument is not that the district court erred in its analysis of its claim under the disparate treatment theory, but that the court erred in failing to analyze her suit under the accommodation theory." *Chalmers*, 101 F.3d at 1018. Unlike disparate treatment, under a failure-to-accommodate theory "an employee can establish a claim even though she cannot show that other (unprotected) employees were treated more favorably or cannot rebut an employer's legitimate, non-discriminatory reason for her discharge." *Id.* To establish a prima facie failure-to-accommodate claim, a plaintiff must show (1) she has a bona fide religious belief or practice that conflicts with an

employment requirement and (2) the need for an accommodation of that religious belief or practice served as a motivating factor in the employer's adverse employment action. *See id.* at 1019; *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015) (clarifying that "the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an [employee's] religious practice, confirmed or otherwise, a factor in employment decisions"). Here, Plaintiff adduced evidence of neither, although we need not proceed beyond the first.

With respect to the leave at issue, Plaintiff does not establish the first element of her claim: a religious conflict with an employment requirement. Her observance of the Sabbath during winter months when the sun sets earlier created a conflict with her normal working hours on Fridays, and MWAA consistently accommodated her request to leave work early. Regarding Jewish holidays, however, no conflict existed between Plaintiff observing religious holidays and following MWAA's neutral rules requiring advance approval of leave following specified procedures. Nor could she establish such a conflict. The Leave Policy merely requires employees to request leave by form or email, and obtain advance approval.

Of particular significance is the fact that Plaintiff points to no occasion on which MWAA denied leave when she requested leave in compliance with MWAA's Leave Policy. To the contrary, the evidence indicates MWAA would have granted her request to

take leave if she had abided by the Leave Policy. MWAA regularly granted her leave to observe religious holidays for the prior 26 years and, in 2013, approved leave for the first two days of Passover and another religious holiday several weeks later. Plaintiff followed the Leave Policy on those occasions. She failed to obtain advance approval for her absence on April 1 and 2, which coincided with the last two days of Passover in 2013, and that failure to comply is the sole differentiating factor from every occasion on which leave was granted.

3. Plaintiff also argues that the district court erred in dismissing respondents O'Hara and Hodge, Plaintiff's first- and second-level supervisors. In *Lissau v. Southern Food Services, Inc.*, we held that supervisors are not liable in their individual capacities for Title VII violations. 159 F.3d 177, 180 (4th Cir. 1998).[8] Plaintiff concedes that *Lissau* dictates dismissing her Title VII claim against Hodge and O'Hara. See Reply Br. at 17–18.[9]

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[8] The district court dismissed the individual defendants on the basis that individual supervisors may not be sued personally when they are carrying out personnel decisions of a plainly delegable character, relying on *Brubeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 n.1 (4th Cir. 1994). J.A. 107. We affirm, however, under the blanket rule this court announced in *Lissau*, 159 F.3d at 180.

[9] Plaintiff nevertheless contends that her § 1983 claim should remain against these individuals. However, because we conclude that Plaintiff's § 1983 claim is time barred, *see infra* Part IV, the district court properly dismissed the individual supervisors.

IV. Plaintiff next argues that the district court erred by granting summary judgment to MWAA on the § 1983 claim when it found that the applicable statute of limitations barred the claim. Because § 1983 does not contain an express statute of limitations, we use state statutes of limitations, and here Virginia's two-year statute-of-limitations period applies. *See A Soc'y Without A Name v. Virginia*, 655 F.3d 342, 348 (4th Cir. 2011). Federal law controls when the applicable statute-of-limitations period begins to run; this occurs when the claim accrues--that is, when the plaintiff "knows or has reason to know of the injury which is the basis of the action."Id.(quoting *Cox v. Stanton*, 529 F.2d 47,50 (4th Cir. 1975)). Plaintiff does not dispute that the action accrued on May 3, 2013, when her disciplinary action became final. *See* Appellant's Br. at 37–38. Plaintiff filed suit on May 5, 2015, more than two years later. The statute of limitations therefore bars her claim.[10]

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[10] Plaintiff suggests that she could not file her §1983 claim earlier. That is incorrect. Plaintiff filed a Charge of Discrimination with the EEOC on September 17,2013. Although she did not receive a right-to-sue letter until February7, 2015, she could have requested one after the 180-day statutory period expired. See42 U.S.C. §2000e-5(f)(1); *seealso*29C.F.R. §1601.28 (explaining that upon request by an aggrieved party "the Commission shall promptly issue" notice of right to sue "at any time after the expiration of one hundred eighty(180) days from the date of filing of the charge with the Commission"). For this reason, Plaintiff's suggestion that Virginia's tolling provision, Va. Code Ann. Section8.01-229(E)(1), tolled her case while her claim was pending before the EEOC lacks merit.

V. The district court properly dismissed Plaintiff's individual supervisors and granted summary judgment to MWAA on both the Title VII and §1983 claims. Accordingly, the judgment of the district court is *AFFIRMED.*

APPENDIX II

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUSAN H. ABELES

Plaintiff- Appellant

v.

METROPOLITAN WASHINGTON
AIRPORTS AUTHORITY, JULIA HODGE
and VALERIE O'HARA

Defendants-Appellees

APPELLANT'S PETITION FOR (1) PANEL REHEARING AND (2) REHEARING EN BANC

INTRODUCTION - In undersigned counsel's judgment the panel decision in this case (i) overlooked material factual and legal matters, (ii) made findings on factual issues that were controverted in the record, (iii) conflicted with Section 701(j) of the Civil Rights Act (42 U.S.C. § 2000e(j)) and with judicial decisions applying that provision, (iv) conflicted with the Religious Freedom Restoration Act (42 U.S.C. § 2000bb), and (v) determined questions of exceptional importance to minority-faith employees in the enforcement of Title VII of the Civil Rights Act (42 U.S.C. §§ 2000e - 2000e-16).

QUESTIONS PRESENTED

1. Whether an employer has made the statutorily prescribed "reasonable accommodation" to the religious observance of an Orthodox Jewish employee by suspending the employee without pay for being away from work on Passover after the employee has (a) followed her 26-year practice of being absent on religious holidays with no prior formal approval process beyond listing for her supervisors the dates of all Jewish holidays on which she would take annual leave, (b) placed the dates of Jewish holidays, as requested by her current supervisors, on their "Outlook" calendars, (c) sent an e-mail on the last workday before the religious holiday, when her immediate supervisor was absent on leave, to both her supervisor and her supervisor's supervisor noting that she would be absent on the following Monday and Tuesday to observe Passover and receiving a return e-mail saying "Thanks. Please see my note about providing us a status update before you leave today."

2. Whether the Metropolitan Washington Airports Authority ("MWAA") is subject to the Religious Freedom Restoration Act (42 U.S.C. § 2000bb *et seq.)* so that the above-described suspension of the appellant was an unlawful substantial burden on appellant's exercise of Orthodox Jewish observance in violation of the Act.

3. Whether factual findings recited by the District Court and by this Court improperly resolved contested issues of fact that appellant was legally entitled to present to a jury.

ARGUMENT I. MS. ABELES WAS PUNISHED BY MWAA FOR TAKING ANNUAL LEAVE ON PASSOVER AFTER REPEATEDLY NOTIFYING HER SUPERVISORS OF THE HOLIDAY AND REASONABLY BELIEVING THAT ANNUAL LEAVE WAS APPROVED IN ADVANCE FOR HER ABSENCE

Some facts recited by the District Court and by the Panel are vigorously contested by the appellant. But the undisputed facts establish that Ms. Abeles did everything an employee could possibly do to satisfy any reasonable requirement that she notify her supervisors in advance of her absence to observe a well –recognized Jewish holiday. Indeed, she even satisfied the language of MWAA's "Annual Leave Policy" – language that the Panel opinion does not quote or construe.

(1) Ms. Abeles Satisfied MWAA's Published "Policy" for "Granting Annual Leave." The Panel Opinion fails to quote or construe the text of the "Annual Leave Policy" that MWAA claims Ms. Abeles ignored in taking annual leave for the concluding days of Passover. That text appears at page 239 of the Joint Appendix. It provides that "use of annual leave will be requested and approved in advance of the absence . . . by an exchange of e-mails between the employee and supervisor." MWAA's "Policy" does not say that the exchange of e-mails must be between the employee and his or her immediate supervisor. The language of the "Policy" includes an "exchange of e-mails" with anyone who qualifies as a "supervisor."

Ms. Abeles sent an e-mail to her two supervisors at 11:59 am on Friday, March 29, 2013, advising them again that she would be on annual leave on Monday, April 1, 2013, and on Tuesday, April 2, 2013. Although her immediate supervisor (Valerie O'Hara) was away on leave, that supervisor's supervisor (Julia Hodge) responded with an e-mail at 12:05 pm asking, "What is the nature of this leave request?" (Emphasis added.) A reasonable understanding of this e-mail is that Ms. Hodge viewed it as a "request" for leave. Ms. Abeles replied promptly at 12:11 pm to her supervisor, "This is a reminder of my schedule leave for Passover." Ms. Hodge, who was also Ms. Abeles' "supervisor," then responded at 12:16 pm, "Thanks. Please see my note about providing us a status update before you leave today."

The "exchange of e-mails between the employee and supervisor" – the condition specified in MWAA's "Leave Policy" – was completed in advance of the absence. Indeed, Ms. Hodge's request for a "status update before you leave today" plainly manifests consent to Ms. Abeles' absence at the beginning of the following week. Consequently, the Panel Opinion is wrong when it says (p. 4) that "[t]he instant dispute arises from Plaintiff's failure to follow MWAA's formal procedure for requesting leave" and finds (p. 14) that Ms. Abeles "failed to obtain advance approval for her absence on April 1 and 2, which coincided with the last two days of Passover in 2013." The record establishes that Ms. Abeles did not fail to follow the "formal procedure for requesting leave" and did obtain advance approval for her absence for religious observance from Ms. Hodge, her "supervisor."

(2) Ms. Abeles Properly Relied on Her 26 Years' Experience With Various Supervisors at MWAA. Ms. Abeles' affidavit in response to MWAA's motion for summary judgment declared under oath with respect to her experience of taking annual leave for Jewish holidays while employed at MWAA under different supervisors (JA 448): "I routinely and invariably advised my supervisors well in advance in each calendar year of the dates when Jewish holidays were to be celebrated. My supervisors uniformly accepted this notification as the equivalent of a request for annual leave, and I was absent from work on these specified dates. I would frequently remind supervisors of these dates as they approached, but I was never told that annual leave would be denied if I did not make a formal 'request' for such leave in advance. Before April 2013, my advance notification of the Jewish holidays was always accepted by my supervisors as the equivalent of a request." The Panel Opinion erroneously found (p. 15), contrary to Ms. Abeles' sworn statement, that Ms. Abeles' failure to "comply" with the published "Leave Policy" was "the sole differentiating factor from every occasion on which leave was granted." In fact, "leave was granted" on every occasion for 26 years when Ms. Abeles followed the same procedure she followed in 2013.

Ms. Abeles was never told by her supervisors that they would condition approval of annual leave for observance of Passover or any other Jewish holiday in 2013 on a formal request for leave and an oral or e-mailed advance consent by Ms. O'Hara or by any supervisor. The Panel Opinion contains a finding (p. 4) that Ms. Abeles was told by O'Hara, Hodge, and

Labor Relations Specialist Ramos that she had to "[u]se leave according to the Airports' Authority's Absence and Leave Policy." This is a disputed fact that could not lawfully be decided on summary judgment. In response to MWAA's motion for summary judgment and Paragraph 20 of MWAA's Statement of Undisputed Material Facts (JA 127-128), Ms. Abeles responded that her meetings with O'Hara, Hodge, and Ramos "were designed to discuss the 2013 Work Goals and Performance Factors. The discussion was about the 9 a.m. arrival time and early departure on Friday. There was no discussion of MWAA's leave policy." (JA 428; emphasis added.)

It is a well-established proposition of law that "[p]ast practices rise to the level of an implied agreement when they have 'ripened into an established custom between the parties.'" *Brotherhood Railway Carmen of the United States and Canada v. Missouri Pacific Railroad Co.*, 944 F.2d 1422, 1429 (8th Cir. 1991), cited by *Bonnell/Tredegar Industries, Inc. v. National Labor Relations Board*, 46 F.3d 339, 344 (4th Cir. 1995) ("any well established practices that constitute a 'course of dealing' between the carrier and employees"). In the present circumstances, the consistent 26-year practice under which Ms. Abeles took annual leave on the Jewish holidays that she listed at the beginning of each calendar year was "established custom" and a "course of dealing" that effectively became part of her employment contract.

II. THE PANEL'S HIGHLY RESTRICTIVE APPLICATION OF THE PROTECTION FOR RELIGIOUS OBSERVANCE IN TITLE VII OF THE CIVIL RIGHTS ACT AND IN THE RELIGIOUS FREEDOM RESTORATION ACT WARRANT REVIEW AND CORRECTION BY THE FULL COURT

(1) The Panel's Ruling Facilitates Evasion of an Employer's Title VII Obligation To Make a Reasonable Accommodation for an Employee's Religious Observance. The Panel Opinion acknowledges (p. 3) that "MWAA knew Plaintiff's religious beliefs prohibited her from working on Jewish holidays." Her Orthodox Jewish faith was so well-known at MWAA that, as the Opinion notes (pp. 3-4), she was permitted to leave early on Fridays and she was provided kosher food at staff events. MWAA has never claimed that her absence on such holidays created any hardship whatever, much less the "undue hardship" that Section 701(j) of the Civil Rights Act, as amended, contemplates as a permissible exception to the statutorily mandated obligation of reasonable accommodation. Nor is there any claim that Ms. Abeles' absence on April 1 and 2, 2013, was a surprise to anyone at MWAA or caught personnel of MWAA unaware.

If the steps Ms. Abeles took before her absence on the last two days of Passover had not, in MWAA's view, fallen short of the letter of its "Leave Policy," MWAA would have been obliged by Title VII of the Civil Rights Act (42 U.S.C. §§ 2000e-2000e-16) (and, in our understanding of the Religious Freedom Restoration Act (42 U.S.C. § 2000bb), by that law as

well) to allow Ms. Abeles to be absent on April 1 and 2, 2013, to observe Passover. MWAA's legal claim – sustained by the Panel – is that Ms. Abeles alleged omission of the technicality of receiving an "OK" from Ms. O'Hara (an "OK" that Ms. O'Hara could not lawfully withhold) justified imposing an unpaid suspension on Ms. Abeles.

This reasoning effectively makes vindication of a federally guaranteed right dependent on miniscule technicalities with which an employer may ambush a religiously observant employee. A hypothetical growing out of *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015), may illustrate this point. If Abercrombie & Fitch hired Ms. Elauf, the practicing Muslim who wears a headscarf for religious observance, as a salesgirl, could it suddenly impose a requirement that, before she goes on the sales floor each day, Ms. Elauf must request and obtain the oral consent of the chief salesperson – even though the chief salesperson could not lawfully deny her request? In the unlikely event that such daily prior oral consent could be required, could Abercrombie & Fitch suddenly penalize Ms. Elauf by suspending her without pay for failure to make the required request, if it had never, in the preceding year, imposed a rule requiring such a request?

These hypothetical facts parallel the situation in this case. Ms. Abeles was penalized by MWAA for failing to have her supervisor approve a request that her supervisor could not lawfully refuse.

In an *amicus curiae* brief (whose filing was opposed by the MWAA) the National Jewish Commission on Law and Public Affairs ("COLPA"), an organization of volunteer attorneys that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States, enumerated reasons why employers frequently try to avoid the "reasonable accommodation to religious observance" requirement of Title VII. COLPA noted that the ruling of the District Court "will significantly hamper the ability of many religious Jews to find and maintain gainful employment." COLPA Br. 2. The full Court should rehear and review the Panel's decision and weigh these consequences.

(2) Whether MWAA Is Exempt from the Religious Freedom Restoration Act and From Virginia's Comparable Law Is an Important Federal Question That This Court Should Decide. In footnote 4 of its Opinion (p. 8), the Panel declined to consider an important question of federal law – *i.e.*, whether MWAA may claim that it is exempt from the federal Religious Freedom Restoration Act (42 U.S.C. § 2000bb, *et seq.*) and Virginia's equivalent – Va. Code Ann. § 57-2.02(B). MWAA is recognized in 49 U.S.C. § 49106(a)(1) as "a public body corporate and politic." It was assigned authority over two airports by the Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-500. Its 17-member Board of Directors is appointed by the President of the United States, the Governors of Virginia and Maryland, and the Mayor of the District of Columbia.

No reported decision has exempted MWAA from either RFRA or its Virginia counterpart. The broad remedial policy of RFRA and its language bring within the law's scope discriminatory conduct by any "person acting under color of law." Following the Supreme Court decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress amended RFRA to withdraw "a State, or a subdivision of a State" from RFRA's reach. It did not, however, remove a "public body corporate and politic" over which Congress had exercised its legislative authority in enacting the Metropolitan Washington Airports Act of 1986. This Court should hold that this archetype of a federal quasi-governmental body is subject to RFRA (and/or its Virginia equivalent) and may be sued under that law when its conduct substantially burdens an employee's exercise of religion and does not further a compelling governmental interest.

In addition to supporting Ms. Abeles' position regarding MWAA's failure to provide reasonable accommodation, the Becket Fund for Religious Liberty and the American Jewish Committee, in a 27-page *amicus curiae* brief, argued persuasively that the MWAA "is a federal instrumentality under *Lebron* [*v. National Railroad Passenger Corp.*, 513 U.S. 374, 399 (1995)]." The legal position urged by the Becket Fund and the American Jewish Committee deserve consideration by the full Court.

III. THE PANEL'S AFFIRMANCE OF SUMMARY JUDGMENT RESTED ON IMPERMISSIBLE RESOLUTION OF DISPUTED FACTS

Disputed factual issues may not be resolved at the summary judgment stage by either a District Court or this Court. *Jacobs v. N.C. Administrative Office of the Courts*, 780 F.3d 562, 569 (4th Cir. 2015); see *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014); *Fountain v. Filson*, 336 U.S. 681, 683 (1948). The Panel Opinion, however, adopted Judge Hilton's findings on contested factual issues and erroneously characterized other findings as undisputed.

(1) The Panel Opinion Erroneously Sustained Judge Hilton's Finding That Ms. Abeles Had Been "Insubordinate." Ms. Abeles has consistently denied the allegations made against her by Mss. O'Hara and Hodge that she was "insubordinate." The Statement of Undisputed Material Facts submitted in opposition to MWAA's motion for summary judgment stated: "Beginning in late 2012, Ms. O'Hara and Ms. Hodge began making unjustified criticisms of plaintiff's performance." JA 342 (emphasis added). In her deposition testimony Ms. Abeles disputed the allegation that her performance had "deteriorated." JA 292-294. She also disputed MWAA's Statement of Undisputed Material Facts in which MWAA had alleged that her performance had "deteriorated." JA 127, 427 (para. 17). The contested nature of this pejorative allegation was made clear in the District Court. See JA 425-426 ("A chain of e-mails that began even before December 2012 demonstrates the supervisors' and HR staffs' pettiness and hostility to Susan, and the e-mails of

April 2 through April 4, 2013, prove how expeditiously they pounced on her absence for religious observance to discipline her in a most ignominious and unlawful manner. We deny that Susan's performance 'deteriorated' suddenly 'at the end of 2012,' as MWAA alleges in paragraph 17 of its 'Statement of Undisputed Material Facts.' Susan defended herself in e-mails and orally against unjustified attacks by Julia Hodge and Valerie O'Hara.")

If this case had proceeded to trial and MWAA had sought to justify its suspension without pay of Ms. Abeles on the ground that she had been insubordinate, MWAA would have had the burden of satisfying a jury that this allegation by her superiors was valid. How does an employee rebut a claim of "insubordination" other than by denying the allegation and asking the individual who has made the allegation to prove it? In this case Judge Hilton and the Panel convicted Ms. Abeles of "insubordination" not because of affirmative proof that she had been "insubordinate," but because she had failed to prove herself innocent. This cast the burden of proof on the wrong party.

Exhibits From MWAA's Files That Were Marked As Trial Exhibits Were Disregarded by the Panel. Ms. Abeles asserted that she had contested the allegation of "insubordination" with a letter from an attorney that MWAA refused to accept because her lawyer was one hour late in requesting an extension of one day in which to respond to the allegation. The Panel Opinion refused to credit this assertion

because "the letter is not included in the record on appeal." Panel Opinion, p. 12, n. 7.

The attorney's letter was marked as Plaintiff's Exhibit 166 in preparation for trial. Paragraphs 36-39 of Ms. Abeles' Statement of Undisputed Material Facts state: "The plaintiff retained counsel to respond to Ms. Hodges' suspension letter. Plaintiff's retained counsel requested an extension of time to respond to the suspension letter. Because the request for an extension of time arrived after close of business on the last day of a 7-day period to respond, the extension was denied. Plaintiff's counsel delivered a letter on the following business day responding to the allegations in Ms. Hodges' suspension letter." JA 434.

MWAA responded to each of these four Statements of Undisputed Material Facts with the same response: "Not in dispute." JA 469. By this response MWAA conceded that Ms. Abeles had retained a lawyer and had responded to the "insubordination" charges in Ms. Hodge's notice of suspension. The Panel Opinion could not, therefore, truthfully state that Ms. Abeles did not contest the allegation of insubordination made by her superiors. The letter from her lawyer – even if not in the appellate record or the Joint Appendix – is admissible at a trial.

Another document produced by MWAA in discovery and marked as Trial Exhibit 97 is a memorandum from Mr. Ramos to Ms. O'Hara dated April 1, 2013 (which was the first of the two days on which Ms. Abeles was observing the end of Passover). Mr. Ramos provided a proposed "reprimand" letter to be

signed by Ms. O'Hara and to be served on Ms. Abeles because of her alleged "insubordination." This memorandum was the subject of testimony during the depositions of Ms. Hodge and Mr. Ramos. Plaintiff can introduce it at trial to prove the proposition that the Panel Opinion refused to credit – *i.e.*, that "absent Plaintiff's failure to request leave properly, MWAA would only have 'reprimanded' Plaintiff for insubordination." (Panel Opinion, p. 11) The Panel Opinion narrowly construes the portion of Ms. Hodge's deposition that appears in the appellate record as not "conceding" this assertion of fact. But the exhibit marked for trial proves that until Ms. Abeles was absent to observe Passover, MWAA's HR Department (*i.e.*, Mr. Ramos) and Ms. Abeles' supervisors were not going to suspend Ms. Abeles but were only intending to "reprimand" her. The five-day suspension without pay was added only after Ms. Abeles was out of the office observing Passover.

CONCLUSION

For the foregoing reasons, the Panel should grant rehearing in this case or the appeal should be reheard en banc.

Respectfully submitted,

s/Nathan Lewin